A

Ng Pak Mei v Sierra Delima Development Sdn Bhd & Anor

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(NCVC)(A)-496–03 OF 2019
MARY LIM, HAS ZANAH MEHAT AND VAZEER ALAM JJCA
13 FEBRUARY 2020

C *Contract — Sale and purchase of property — Deed of novation — Appellant purchased the property from the original purchasers through deed of novation — First respondent entered into settlement agreement with second respondent for payment of construction cost — Charge was created in favour of second respondent* D *— Whether Housing Development (Control and Licensing) Act 1996 was applicable to appellant as novatee of deed of novation — Whether breach of SPA in not obtaining consent of purchaser to create charge had any bearing on legality of charge — Housing Development (Control and Licensing) Regulations 1989 r 11*

E The appellant sought a declaration in High Court that the charge and the lien holder's caveat ('the charge') entered in favour of the second respondent were unlawful and void as it had contravened the provisions of reg 11 of the Housing Development (Control and Licensing) Regulations 1989 ('the Regulations') made under the Housing Development (Control and Licensing) Act 1996 F ('the Act'). The appellant was one of the purchasers of a parcel in the housing development on land belonging to the first respondent ('the project') by virtue of the deed of novation with the original purchasers, Gurdip Singh and Harjender Singh executed with the consent of the first respondent. The second respondent was the contractor of the project. To settle unpaid construction G cost, the first respondent entered into the settlement agreement with the second respondent. Pursuant to the settlement agreement, the charge was created in favour of the second respondent. The issues were: (a) whether the Act was applicable to the appellant as being the novatee of the deed of novation; and (b) whether breach of SPA in not obtaining the consent of the purchaser to H create the charge had any bearing on the legality of charge.

Held, allowing appeal and setting aside High Court's order:

(1) It was clear under cl 2 of the deed of novation which stipulated that the novatee shall be entitled to all whatsoever rights, title and interest I pursuant to sale and purchase agreement as if the novatee was the original party thereto in place of the novator. By virtue of the deed of novation, the appellant stepped into the shoes of the original purchaser and received all benefits and assumed all liabilities under the sale and purchase agreement. Regardless of the date of the deed of novation, the parties

were bound by the sale and purchase agreement and the Act and the Regulations made thereunder (see para 4).

(2) Regulation 11 provides that every contract of sale where the contract of sale was for the sale and purchase of a housing accommodation in a subdivided building in the form of a parcel of a building or land intended for subdivision into parcels, as the case may be, it shall be in the form prescribed in Schedule H. Therefore, it was considered view that cl 3 of the sale and purchase agreement (which was the standard form contract prescribed by Schedule H) required mandatory conformity by the parties. The legislative intent in the said cl 3 was clear that the developer shall not at any time after the execution of sale and purchase agreement, subjected the land to any encumbrances without the prior consent of the purchasers where parties were not allowed to depart from. Non-compliance of cl 3 of the sale and purchase agreement was not merely a breach of sale and purchase agreement but also constituted a breach of statutory requirement. The agreement between the first respondent and the second respondent in creating the charge in absence of the prior consent of the original purchasers in the sale and purchase agreement was of such a nature would defeat the purpose of the Act, in particular Schedule H, that was to clothe the purchasers with the required protection from unscrupulous property developers as envisaged by the legislators. The creation of the charge in such manner would render the charge unlawful, illegal and void (see paras 5–6 & 10).

[Bahasa Malaysia summary

Perayu meminta satu deklarasi di Mahkamah Tinggi bahawa gadaian dan kaveat oleh pemegang lien ('gadaian') yang didaftarkan kepada responden kedua adalah tidak sah dan terbatal kerana telah melanggar syarat Peraturan 11 Peraturan-Peraturan Pemajuan Perumahan (Kawalan dan Perlesenan) 1989 ('Peraturan') yang dibuat di bawah Akta Pemajuan Perumahan (Kawalan dan Perlesenan) 1996 ('Akta'). Perayu adalah salah satu pembeli petak dalam pembangunan perumahan di tanah milik responden pertama ('projek') berdasarkan perjanjian novasi dengan pembeli-pembeli asal, Gurdip Singh dan Harjender Singh dimeterai dengan persetujuan responden pertama. Responden kedua adalah kontraktor projek tersebut. Untuk menyelesaikan kos pembinaan yang belum dibayar, responden pertama telah membuat perjanjian penyelesaian dengan responden kedua. Berdasarkan perjanjian penyelesaian teresebut, gadaian tersebut dibuat kepada responden kedua. Isu-isunya ialah: (a) adakah Akta itu terpakai bagi perayu sebagai pihak yang menerima dalam perjanjian penukaran; dan (b) sama ada terdapat pelanggaran perjanjian jual beli kerana tidak mendapat persetujuan pembeli untuk membuat gadaian yang juga mempunyai kaitan dengan kesahihan gadaian.

Diputuskan, membenarkan rayuan dan penolakan perintah Mahkamah Tinggi:

(1) Adalah jelas di bawah klausa 2 perjanjian novasi yang menetapkan bahawa *novatee* yang menerima hak berhak ke atas semua hak dan kepentingan apa pun berdasarkan perjanjian jual beli seolah-olah yang menerima hak adalah pihak yang asal menggantikan yang memberikan hak. Berdasarkan perjanjian novasi, perayu telah memasuki kasut pembeli asal dan menerima semua kepentingan dan memiliki semua tanggungjawab di bawah perjanjian jual beli. Tanpa mengira tarikh perjanjian novasi, pihak-pihak terikat dengan perjanjian jual beli dan Akta dan Peraturan yang dibuat di bawahnya (lihat perenggan 4).

(2) Peraturan 11 menetapkan bahawa setiap kontrak penjualan di mana kontrak penjualan adalah untuk penjualan dan pembelian tempat tinggal perumahan di bangunan yang dipecahkan dalam bentuk petak bangunan atau tanah yang berniat untuk dipecahkan dalam bentuk petak, yang mana yang berkaitan, perlu dibuat dalam format yang ditetapkan dalam Jadual H. Oleh itu, klausa 3 perjanjian jual beli (yang merupakan kontrak bentuk standard yang ditetapkan oleh Jadual H) dianggap pematuhan wajib oleh pihak-pihak. Niat perundangan dalam klausa 3 tersebut adalah jelas bahawa pemaju tidak boleh pada bila-bila masa setelah perjanjian jual beli dimeterai, menyerahkan tanah tersebut untuk membuat bebanan tanpa mendapatkan persetujuan dari pembeli yang mana pihak-pihak tidak dibenarkan bertolak dari. Ketidakpatuhan atas klausa 3 perjanjian jual beli bukan hanya melanggari perjanjian jual beli tetapi merupakan satu pelanggaran syarat undang-undang. Perjanjian antara responden pertama dan responden kedua dalam wujuhan cagaran sekiranya tidak mempunyai persetujuan terlebih dahulu daripada pembeli asal dalam perjanjian jual beli adalah tidak selari dengan tujuan Akta, khususnya Jadual H, iaitu untuk memberi perlindungan yang diperlukan kepada pembeli dari pemaju hartanah yang tidak bermoral seperti yang dibayangkan oleh perundangan. Kewujudan cagaran sedemikian akan menjadikan cagaran tersebut tidak sah dan terbatal (lihat perenggan 5–6 & 10).]

Cases referred to

Bodco Engineering and Construction Sdn Bhd v Tribunal For Housing Purchaser Claims & Ors [2017] 4 MLJ 501, CA (folld)

Foong Seong Equipment Sdn Bhd (receivers and managers appointed) v Keris Properties (PK) Sdn Bhd and another appeal [2013] 2 MLJ 361; [2011] 4 CLJ 1, FC (folld)

Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd (Bhagat Singh s/o Surian Singh & Ors, interveners) [1996] 2 MLJ 431, HC (refd)

Khau Daw Yau v Kin Nam Realty Development Sdn Bhd [1983] 1 MLJ 335; [1982] 1 LNS 81 (refd)

SEA Housing Corporation Sdn Bhd v Lee Poh Choo [1982] 2 MLJ 31; [1982] CLJ 355; [1982] CLJ Rep 305, FC (refd)

Legislation referred to

Contracts Act 1950 s 24, 24(b)
Housing Development (Control And Licensing) Act 1996 s 24, Schedule H
Housing Development (Control And Licensing) Regulations 1989 reg 11

Appeal from: Originating Summons No BA-24NCVC-1179–09 of 2018 (High Court, Shah Alam)

Kam Pei Yee (Angie Yoo with her) (David Lai & Tan) for the appellant.
Siew Yew Ming (Chan Mun Fei with him) (Raja Eleena Siew Ang & Assoc) for the second respondent.

Has Zanah Mehat JCA:

[1] Having considered parties' submissions, both oral and written record of appeal and the grounds decision, we have now reached our decision. The following are our brief reasons.

[2] In the High Court, the appellant sought a declaration that the charge and the lien holder's caveat (collectively referred as 'the charge') entered in favour of the second respondent are unlawful and void as it had contravened the provisions of reg 11 of the Housing Development (Control And Licensing) Regulations 1989 (PU(A) 58/89) ('the Regulations 1989'), made under the Housing Development (Control And Licensing) Act 1996 ('the HDA'). His Lordship dismissed the appellants' application.

[3] The appellant is one of the purchasers of a parcel in the housing development on land belonging to the first respondent ('the project') by virtue of the deed of novation dated 3 September 2018 ('deed of novation') with one Gurdip Singh and Harjender Kaur ('the original purchasers') executed with the consent of the first respondent. The original purchasers had entered a SPA with the first respondent. It is not disputed that the SPA is subject to the HDA. The second respondent is the contractor for the project. To settle unpaid construction costs, the first respondent entered into a settlement agreement with the second respondent dated 6 July 2017. Pursuant to the settlement agreement, the charge was created in favour of the second respondent. It is a fact that the deed of novation was entered after the charge was created.

[4] First we will answer the issue on locus standi and whether the HDA is applicable to the appellant as being the novatee of the deed of novation. His Lordship's finding is that the appellant acquired her interest as a new purchaser

by virtue of the deed of novation dated after the creation of the charge. Therefore, reg 11 does not apply to the appellant and there was no breach of the Regulations by the respondents. We disagree with His Lordship. It is clear under cl 2 of the deed of novation which stipulates that the novatee shall be entitled to all whatsoever rights, title and interest pursuant to the sale and purchase agreement as if the novatee is the original party thereto in place of the novator. By virtue of this deed of novation the appellant steps into the shoes of the original purchaser and receives all benefits and assumes all liabilities under the SPA. As such, regardless the date of the deed of novation, parties are still bound by the SPA and the HDA and Regulations made thereunder.

[5] On the second issue, whether the breach of the SPA in not obtaining the consent of the purchasers to create the charge has any bearing on the legality of the charge, His Lordship answered this in the negative. With respect we disagree with His Lordship. Section 24 of the HDA confers on the minister powers to make regulations for the purpose of carrying into effect the provisions of the HDA, resulting in reg 11 of the Regulations 1989 being made. Regulation 11 provides that every contract of sale where the contract of sale is for the sale and purchase of a housing accommodation in a subdivided building in the form of a parcel of a building or land intended for subdivision into parcels, as the case may be, it shall be in the form prescribed in Schedule H. Therefore, it is our considered view that cl 3 of the SPA (which is the standard form contract prescribed by Schedule H) requires mandatory conformity by the parties. The legislative intent in the said cl 3 which binds the affected parties makes it clear that the developer shall not at any time after the execution of the SPA, subject the land to any encumbrances (in the present case the creation of the charge) without the prior consent of the purchasers where parties are not allowed to depart from. In this regard, it is not a matter of dispute by the respondents that no such required consent was obtained from the original purchasers prior to the creation of the said charge.

[6] Consequently, it is our considered view that the non-compliance of cl 3 of the SPA is not merely a breach of the sale and purchase agreement but would also constitute a breach of the statutory requirements. We find support in *Bodco Engineering and Construction Sdn Bhd v Tribunal For Housing Purchaser Claims & Ors* [2017] 4 MLJ 501; *Foong Seong Equipment Sdn Bhd (receivers and managers appointed) v Keris Properties (PK) Sdn Bhd and another appeal* [2013] 2 MLJ 361; [2011] 4 CLJ 1 at para [21].

[7] In *Keng Soon Finance Bhd v MK Retnam Holdings Sdn Bhd (Bhagat Singh s/o Surian Singh & Ors, interveners)* [1996] 2 MLJ 431 it was held that, a court will not enforce a contract which is expressly or impliedly prohibited by statute.

[8] It is trite that an agreement in contravention of written law is unlawful or

illegal as can be seen in s 24 of the Contracts Act 1950 (Revised 1974, Act 138), where in s 24(b), it contains clear provisions that the consideration or object of an agreement is lawful, unless it is of such a nature that, if permitted, it would defeat any law.

[9] The housing legislation is primarily aimed at, amongst others, protecting the interests of purchasers to counter the economic and bargaining power imbalance of the parties: see *Malaysian Law on Housing Developers* (2nd Ed, 2002) by Salleh Buang, pp 7–8; *SEA Housing Corporation Sdn Bhd v Lee Poh Choo* [1982] 2 MLJ 31; [1982] CLJ 355; [1982] CLJ Rep 305 per Suffian LP; and *Khau Daw Yau v Kin Nam Realty Development Sdn Bhd* [1982] 1 LNS 81; [1983] 1 MLJ 335 at p 341 per VC George J (later JCA). The HDA is a piece of social legislation; hence its provisions should be given a liberal and purposive interpretation ie to promote the general legislative purpose underlying the provisions.

[10] We, therefore conclude in our determination that the agreement between the first respondent and the second respondent in creating the charge in absence of the prior consent of the original purchasers in the SPA (which was subsequently novated to the appellant) is of such a nature, if permitted, would defeat the purpose of HDA, in particular Schedule H, that is to clothe the purchasers with the required protection from unscrupulous property developers as envisaged by the legislators. That said, the creation of the charge in such manner as in the appeal before us would render the charge unlawful, illegal and therefore void.

[11] Premised on the foregoing reasons, we are inclined to allow the appeal and consequently all prayers in the originating summons are allowed. The High Court order dated 20 February 2019 is set aside. Costs subject to payment of allocate to the Appellant.

Appeal allowed; High Court order set aside.

Reported by Mohd Kamarul Anwar